

**Before
The Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

**Preserving the Open Internet
Broadband Industry Practices**

**GN Docket No. 09-191
WC Docket No. 07-52**

**COMMENTS OF
OPEN MEDIA AND INFORMATION COMPANIES INITIATIVE, et al**

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These comments are offered by the Open Media and Information Companies Initiative (Open MIC), a non-profit media advocacy organization, and Trillium Asset Management Corp. (TAMC), an independent investment management firm dedicated to socially responsible investing.

We welcome the opportunity to offer perspective on this critical public policy issue. As the Commission suggests in its Notice of Proposed Rulemaking, preservation of a free and open Internet requires the adoption and implementation of clear principles, policies and practices by Internet Service Providers (ISPs).

1. INVESTOR PERSPECTIVE

Commenter Open MIC (www.openmic.org) organizes shareholders of publicly-held media and information technology companies to bring about responsible corporate management policies; its organizing principle is that a dynamic, open and critical media sector is good for both the business of media and the health of democratic society.

Members of the Open MIC coalition are investors, investment advisory and mutual fund companies, foundations and shareholder advocacy groups with a combined total of more than \$100 billion in assets under management.

In addition to commenter Trillium Asset Management, members of the Open MIC coalition have included leading socially responsible investment firms Boston Common Asset Management, Calvert Asset Management Company, Domini Social Investments, Harrington Investments; the As You Sow Foundation; and the New York City Pension Funds.

To date, Open MIC has focused largely on the practices of U.S. ISPs; a particular concern has been the deployment of “deep packet inspection” and content filtering technologies by ISPs. Starting in 2009 and continuing into the current 2010 proxy season, the Open MIC coalition has introduced multiple shareholder resolutions at publicly-held ISPs seeking reports from their boards regarding Internet network management practices and their impact on Internet privacy and freedom of expression.

In 2009, at two of those ISPs - CenturyTel, Inc. and EarthLink, Inc. – investors controlling stock worth almost \$1 billion voted in favor of the Open MIC resolutions. At CenturyTel, the resolution received a remarkable 30% of the vote – a clear expression of shareholder concern. A third ISP, Knology Inc., agreed to revise its Internet privacy policy following the filing of a shareholder resolution.

As investors with a long-term view of value creation, members of the Open MIC coalition believe the Internet offers enormous opportunities for our economy and society. The potential of the Internet to open new markets for commerce, new venues for cultural expression and new modalities of civic engagement is without historic parallel.

We have also concluded that Internet commerce is a critical economic driver; as widely diversified investors, we consider broad-based economic growth important to increasing the value of our portfolios. Accordingly, we view threats to the health of Internet-based commerce as a material issue.

To ensure the growth of this digital economy, Open MIC has sought to persuade the ISPs' managements that providing greater *transparency* and *accountability* for their network management practices is in the corporations' and their shareholders' best interests.

2. PORTFOLIO PERFORMANCE

With our investor perspective in mind, we seek to impress on the Commission the importance of these proceedings not only to shareholders of individual companies but also to widely diversified investors – such as members of the Open MIC coalition – that have fiduciary interests in a broad range of industries and businesses.

The Commission's own statements, and those of other commenters, include highly persuasive and compelling arguments that the proposed principles, when applied to ISPs and other Internet companies, will in fact have a major positive impact on the economy by virtue of the fact that they promote free speech, civic participation, democratic engagement and marketplace competition, as well as robust broadband adoption and participation in the Internet community by minorities and other socially and economically disadvantaged groups.

For example, in examining the record of filings to the Commission since the Notice of Proposed Rulemaking, we were struck, as investors, by the concerns expressed by one leading provider of electronic health services, Greenway Medical Services, regarding the importance of preserving an open Internet.

Greenway has expressed fear to the Commission staff that ISPs would enter into exclusive contracts with competitors to prioritize traffic or ensure quality of service, thereby creating an uneven playing field that would stymie innovation and investment in electronic health records systems. Further, Greenway suggests, allowing service providers to charge fees for such prioritization would have a negative impact on the provision of health records, especially in rural areas, where consumers are less able to shoulder additional costs.

Greenway's comments reinforce a growing awareness among widely diversified and universal-owner investors that the greatest source of risk to a broadly diversified portfolio is that profit-seeking externalities and risks caused by one portion of the portfolio come back into the portfolio elsewhere, lowering overall returns.

Academic research, for example, has demonstrated how pharmaceuticals' high drug prices, while seemingly boosting income of drug makers, can have a negative impact on investment portfolios as the result of reduced worker health and productivity.¹

For diversified investors it is therefore critical that public policy be developed with an eye toward the economic health of the entire economy since a systematic governance failure in only one area can be a detriment to the investor's portfolio.

As but one example of this, a January 2010 study by the Institute for Policy Integrity at the NYU School of Law concluded:

“Without net neutrality rules, new technologies could lead to pricing practices that transfer wealth from content providers to ISPs, a form of price discrimination that would reduce the return on investment for Internet content—meaning website owners, bloggers, newspapers, and businesses would have less incentive to expand their sites and applications.”²

In the present case, we are persuaded that failure to prevent the potential harms of permitting Internet traffic degradation or prioritization would increase overall financial risk to widely diversified and universal owner investors. As we explain later, we favor adoption of a strict non-discrimination rule and rules requiring greater network management transparency.

3. NON-DISCRIMINATION RULE & ADDRESSING THE DIGITAL DIVIDE

The Commission seeks comment on two important issues.

First, on “whether our proposed nondiscrimination rule will promote free speech, civic participation, and democratic engagement. Would discrimination by access providers interfere with those goals?”

And, second, on “possible implications that the draft rules we propose here might have on efforts to close the digital divide and encourage robust broadband adoption and participation in the Internet community by minorities and other socially and economically disadvantaged groups.”

We believe these issues are related and frequently intertwined.

In December 15, 2009 letter to FCC Chairman Genachowski from AT&T Executive Vice President James Cicconi, the company argues for a “flexible” non-discrimination rule and against a strict rule, arguing that a strict rule could result in a ban on “voluntary commercial agreements for market participants” and “such a ban could harm innovation and potentially delay critical infrastructure investment by prohibiting services that prove to be neither anti-consumer nor anti-competitive.”³

We find it curious that AT&T equates the need to protect “innovation” with a need to protect its rights as gatekeepers of content. The question: would AT&T abide by a “flexible” non-discrimination rule of the type it proposes in its letter to Chairman Genachowski?

We have no reason to believe that it will – and we have tried valiantly to gather supporting evidence of AT&T’s commitment to non-discrimination rules.

In 2007, for example, commenter Trillium Asset Management, which held a sizeable investment position in AT&T, contacted company management following the censoring by AT&T of a webcast by the rock group Pearl Jam which contained politically pointed but not obscene lyrics. AT&T blamed an overzealous sub-contractor but admitted to a “handful” of similar incidents.

However, AT&T would not provide Trillium with a copy of its freedom of speech policies and the company has consistently refused to make public its policies regarding censorship.

Subsequently, AT&T has also refused to allow its shareholders to vote on resolutions proposed by Trillium that would give investors an opportunity for an advisory vote regarding open Internet principles and their importance to the business of the company.

As for the digital divide, again we refer to comments already in the Commission’s public record. Ruth Livier, an independent producer of web videos, correctly notes the dramatic growth in popularity of video content produced specifically for the Internet.⁴

As Ms. Livier notes, during a one-year period online video usage in the United States has grown by more than 24 percent, with advertisers spending \$587 million in online video advertising in 2008.

As an “American and a Latina,” Ms. Livier notes, “I wanted to tell a story that was more in line with the vast majority of the 47 million Latinos who are contributing positively to our communities, rather than the oftentimes biased portrayals of mainstream media.”

Ms. Livier’s web series, Ylse, has now attracted an audience of a half million viewers.

Ms. Livier writes: “Allowing ISPs to construct barriers to entry or to offer uncompetitive advantages to those with the deepest pockets will only serve to derail the innovation and entrepreneurial spirit since it was created.”

Support for this conclusion comes from economic and legal research such as the previously-cited report by the Institute for Policy Integrity at NYU School of Law. The study notes that new technologies like Deep Packet Inspection (DPI) will enable a dangerous element of price discrimination on the Internet. According to the study:

“DPI technology is the final component, making Internet market segmentation possible and therefore allowing price discrimination. DPI makes it possible for ISPs to identify the source and type of packets traveling over their network, and to treat them differently for pricing purposes. By using DPI to charge content providers (for) their willingness-to-pay to access subscribers, and thereby extract surplus from content providers, ISPs would be able to transfer surplus from content providers to themselves. This would amount to a significant “wealth transfer” in the Internet market—a transfer of surplus from Internet content providers to Internet Service Providers. Ending the *de facto* net neutrality regime could force every content provider to pay each ISP to access the ISP’s broadband subscribers. Content providers would then need to use part of their revenue to pay ISPs for access to subscribers.”⁵

While acknowledging the need for governmental policy to encourage investment in broadband infrastructure, the Institute for Policy Integrity study concludes that discrimination based on price would be dangerous because it would:

“...drastically reduce the value of the Internet by destroying its unrestricted end-to-end dynamic architecture. With less content, less information, and fewer websites, the network could become less valuable for users; and some users may leave the network, making it less valuable for other content providers and other users.”⁶

4. NEED FOR GREATER TRANSPARENCY

The Commission proposes to codify a sixth principle of transparency, asserting: “We believe that sunlight is the best disinfectant and that transparency discourages inefficient and socially harmful market behavior.”

We concur with the Commission on the need for greater transparency and its benefit to multiple stakeholders, including consumers; content, application and service providers; and policy makers.

However, we are deeply concerned that the contemplated transparency requirements will not go far enough in addressing issues of material importance to investors.

While the Commission notes the greater benefits transparency might offer to investors in application developers and other new Internet services, we believe it is also vitally important to those who invest currently, or in the future, in major ISPs. This is especially true for mutual funds or investment firms as they seek to fulfill their fiduciary duties to investors.

Failure to provide greater transparency regarding privacy practices will weaken consumers’ confidence in ISPs and their willingness to protect consumers’ privacy and freedom of expression. Such failure will also heighten the companies’ perceived risk and penalize their share values.

Current levels of secrecy surrounding network management principles make it impossible for analysts and shareholders to adequately assess potentially significant financial risk.

As noted in a recent letter to Mary L. Schapiro, Chairman of the Securities and Exchange Commission, from the Social Investment Forum, “recent legal scholarship suggests there may be an emerging fiduciary duty for corporate directors to consider human rights issues that may present severe legal, operational and reputational risks to the long-term value of corporations. If corporate directors must consider these issues, it is certainly prudent for investors to understand them as well.”⁷

Our concerns are rooted in our particular experience in dealing, as investors, with major ISPs. Critical to this analysis is the importance and “materiality” of certain basic human rights – including freedom of expression and privacy – in the operations of media and telecommunications companies.

As one example of this, enormous public attention has been focused in recent years on the Internet filtering practices of countries with repressive governments. Indeed, a multi-stakeholder dialogue among investors, civil society groups and some companies – notably Yahoo!, Microsoft and Google – resulted in the 2008 launch of the Global Network Initiative, an organization whose aim is to encourage the adoption of principles and implementation guidelines affecting freedom of expression and privacy on the Internet.

The Global Network Initiative Principles are based on internationally recognized laws and standards for human rights, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

Yet not a single U.S. ISP has agreed to join the Global Network Initiative or endorse its principles. Their reluctance reflects an ongoing unwillingness to engage with users of the Internet on critical matters affecting freedom of expression and privacy. ISPs based in the U.S. react with shock and horror at the suggestion that their network management policies are in any way similar to those of repressive overseas regimes. Yet they do little to be responsive when legitimate questions are raised by investors and others.

(We have described earlier AT&T’s refusal to provide Trillium with a copy of its freedom of speech policies as well as its refusal to allow shareholders to vote on resolutions regarding open Internet principles and their importance to the business of the company.)

These are not abstract concerns. In May 2008, the law firm of Weil, Gotshal & Manges LLP issued a memo signed by Ira Milstein, E. Norman Veasey and litigation counsel Harvey Goldschmid, which stated that “violations of human rights may constitute material risks for many U.S. corporations, not only in the United States, but also in foreign jurisdictions where they conduct business... Additionally, and beyond the obligation to manage risks, and comply

with law, there is a substantial business case in favor of safeguarding human rights wherever the company does business.”⁸

SUMMARY

With this proposed rule making, the Commission is addressing matters of extreme importance to our economy, with impact on both widely diversified investors as well as shareholders in individual companies. We thank the Commission for this opportunity to comment and look forward to participating in the ongoing discussion regarding these proceedings.

¹ “Why Lower Drug Prices Benefit Institutional Investors: an application of universal ownership theory,” Steve Lippman, Daniel E. Rosan and Adam Seitchik, Corporate Governance: An International Review Volume 15 Issue 3, Pages 455 – 466, May 3, 2007.

² “Stocks for the Long Run?” Adam Seitchik, Ph.D., CFA, article on file with commenters with reference to The Global Investment Returns Yearbook (originally known as The Millennium Book), 2000, London Business School, Elroy Dimson, Paul Marsh and Mike Staunton in conjunction with ABN AMRO.

² “Free to Invest: The Economic Benefits of Preserving Net Neutrality” by Inimai M. Chettiar and J. Scott Holladay, Institute of Policy Integrity, New York University School of Law. http://policyintegrity.org/documents/Free_to_Invest.pdf

³ Letter from James Cicconi to FCC Chairman Jules Genachowski, December 15, 2009, filed with the Commission.

⁴ Comments of Ruth Livier, Livier Productions Inc, filed with the Commission.

⁵ “Free to Invest: The Economic Benefits of Preserving Net Neutrality,” Ibid.

⁶ Id.

⁷ Social Investment Forum, Letter to the Securities and Exchange Commission, http://www.socialinvest.org/documents/ESG_Letter_to_SEC.pdf

⁸ <http://www.reports-and-materials.org/Weil-Gotshal-legal-commentary-on-Ruggie-report-22-May-2008.pdf>